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500720—42——1

United States Court of Customs and Patent Appeals

No. 4419

THE UNITED STATES, APPELLANT

vs.

SCHENLEY IMPORT CORP., APPELLEE

PETITION FOR REVIEW

To the honorable the United States Court of Customs and Patent Appeals:

Your petitioner, being dissatisfied with the decision and judgment of the United States Customs Court in each of the matters referred to in the annexed Schedule A, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision and judgment with which your petitioner is dissatisfied are set forth in the annexed Assignment of Errors.

Dated, New York, N. Y., November 12, 1942.

THE UNITED STATES,
By PAUL P. RAO,
Paul P. Rao,
Assistant Attorney General, Attorney for Appellant,
201 Varick Street, New York, N. Y.

ASSIGNMENT OF ERRORS

The United States Customs Court has erred as follows:

1. In sustaining the protest and entering judgment for the importer.

2. In finding and holding in effect, for the reasons expressed in the case of *Rathjen Brothers* v. *United States*, decided July 1, 1942, C. D. 659, that the increased rate on distilled spirits (which term includes

rum) fixed by the Revenue Act of 1938, viz, $2.25 as of July 1, 1938, should not be held to apply to rum imported from and the product of Cuba which by the terms of a Trade Agreement with that country (T. D. 47232) was exempt from taxes in excess of the amount in effect on August 24, 1934, viz, $2.00 per proof gallon.

3. In finding and holding in effect, that the merchandise which was imported and entered for warehouse July 1, 1938, and entirely withdrawn on or before July 11, 1938, is subject to the Liquor Taxing Act of 1934 at $2.00 per proof gallon.

4. In not finding and holding that the merchandise which was imported and entered for warehouse July 1, 1938, and entirely withdrawn on or before July 11, 1938, is subject to assessment at $2.25 per proof gallon under section 600 (a) (4), as amended by section 710 of the Revenue Act of 1938 (52 Stat. 572).

5. In not finding and holding that section 710 of the Revenue Act of 1938, amending section 600 (a) (4) of the Revenue Act of 1938, being later in date than the Cuban Agreement of 1934 (T. D. 47232), superseded the conflicting provisions of the said earlier trade agreement.

6. In finding and holding in effect, for the reasons expressed in the *Rathjen* case, *supra*, that the provisions contained in the third and fifth paragraphs of Article III of the Supplementary Trade Agreement with Cuba of December 23, 1939 (T. D. 50050) was indicative of the intention of the parties to the Cuban Trade Agreement of 1934 and that both parties to said Supplementary Agreement recognized that under the terms of Article VIII of the Trade Agreement of 1934 the exclusive rates therein provided would not be subject to conflicting laws which might subsequently be enacted.

7. In not finding and holding that the amendment to Article VIII of the said agreement of 1934 contained in the Supplementary Trade Agreement of December 23, 1939 (T. D. 50050), evidenced a recognition by the contracting parties that section 600 (a) (4) of the Revenue Act of 1938, as amended by section 710 of the Revenue Act of 1938, had superseded the conflicting provisions contained in Article VIII of the original trade agreement, and that said amendment in said supplementary trade agreement was intended to give recognition to that operation.

8. In finding and holding in effect, for the reasons expressed in the *Rathjen* case, *supra*, that "The Analysis of General Provisions and Reciprocal Benefits in the Supplementary Trade Agreement with Cuba," issued by the Department of State on December 23, 1941, constituted any evidence as to the intent of Congress in enacting section 710 of the Revenue Act of 1938.

SCHEDULE A

Port: New York, N. Y.

Subject: Internal Revenue Tax (Recip. Treaty).

Decided: July 27, 1942. Rehearing denied September 15, 1942.

Protest No. 989463–G/5106; vessel, *Oriskany;* entry No. Bond 74; date of entry, July 1, 1938.

STATE OF NEW YORK,

City and County of New York, ss:

Mary Amico, being duly sworn, deposes and says that she is over the age of 18 years; that she is a messenger in the office of the Assistant Attorney General in charge of customs cases; that on the 12th day of November 1942 deponent served the within Petition for Review upon Puckhafer, Rode & Rode, attorneys for the appellee herein, by depositing a true copy thereof, properly inclosed in a securely closed and duly franked official wrapper of the United States Department of Justice, in a letter box duly maintained by the United States Government and under the care of the Post Office at New York City, addressed to said Puckhafer, Rode & Rode at No. 18 Bridge Street, New York, N. Y., that being the address designated by them for that purpose upon the preceding papers herein.

MARY AMICO.

Sworn to before me this 12th day of November 1942.

MARY K. MCQUADE,

Notary Public, N. Y. Co., No. 65, Reg. No. 3.

Commission expires March 30, 1943.

[Indorsed:] Filed Nov. 13, 1942. United States Court of Customs and Patent Appeals. Arthur B. Shelton, Clerk.

NOTICE OF APPEARANCE

NOVEMBER 14, 1942.

Mr. ARTHUR B. SHELTON, CLERK,

U. S. Court of Customs & Patent Appeals,

Washington, D. C.

SIR: Will you please enter our appearance as attorneys for the Appellee in Appeal No. 4419, *The United States, Appellant,* vs. *Schenley Import Corp., Appellee.*

Respectfully,

PUCKHAFER, RODE & RODE,

18 Bridge Street, New York.

[Indorsed:] Filed Nov. 16, 1942. United States Court of Customs and Patent Appeals. Arthur B. Shelton, Clerk.

RETURN TO COURT OF CUSTOMS AND PATENT APPEALS

UNITED STATES CUSTOMS COURT

Suit 4419

THE UNITED STATES, *Appellant*

v.

SCHENLEY IMPORT CORP., *Appellee*

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review of the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following: A copy of—

1. Protest 989463–G/5106 and memorandum of collector of customs.
2. Stipulation of counsel.
3. The decision in question, Abstract 47420, and judgment.
4. Motion for rehearing, memorandum in opposition thereto, and order denying rehearing.

The entry papers will be forwarded later.

Witness, The Honorable Presiding Judge of the United States Customs Court, this 8th day of December, A. D. 1942.

[SEAL] P. S. DEMARCO,
Acting Clerk.

Rum from Cuba.

PROTEST NO. 989463–G/5106

New York, Mar. 9, 1939.

HON. COLLECTOR OF CUSTOMS,
Port of New York.

SIR: Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duty or tax and your decision assessing duty or tax at $2.25 per proof or wine gal. under the Revenue Act of 1938, and/or your decision assessing duty at $2.50 per proof or wine gal. less 20% under Schedule II (Tar-

iff Act of 1930, Par. 802) of the Cuban Trade Agreement (T. D. 47232 by virtue of T. D. 47667, on certain imported rum.

It is claimed that your assessment of $2.25 per proof or wine gal. under the Revenue Act of 1938 is in fact and in law a customs duty. It is further claimed pursuant to Article III of the Cuban Trade Agreement (T. D. 47232) that the merchandise is not chargeable with said $2.25 per proof or wine gal. duty.

It is claimed that the merchandise is only dutiable at the rate of $2 per proof or wine gal. under Schedule II of said Cuban Trade Agreement or said Agreement by virtue of T. D. 47667, and is not chargeable with any other tax or duty.

It is alternatively claimed that said merchandise is only dutiable at $2.50 per proof or wine gal. less 20% (the minimum preferential reduction to Cuba) under Schedule II (Columns I and II) of the Cuban Trade Agreement (T. D. 47232).

It is alternatively claimed that if said merchandise is subject to assessment under the Revenue Act of 1938, it is entitled to a reduction of 20% from the rate therein provided under the provisions of the Amendment of the Tariff Act of 1930 and the Cuban Trade Agreement (T. D. 47232). (See T. D. 48882.)

It is alternatively claimed that the merchandise is only subject to an Internal Revenue tax or duty of $2 per proof or wine gal. under the Liquor Taxing Act of 1934, by virtue of Article VIII of the Cuban Trade Agreement (T. D. 47232).

It is further claimed pursuant to Article III of said Cuban Trade Agreement that the duty or tax must be assessed on the actual number of proof gallons imported.

Each of the above claims is made, and only made, with the proviso and conditionally, that the rate claimed is lower than the rate assessed.

Entry No Bond 74; vessel, *Oriskany;* entered, 7/1/38; liquidated, 2/28/39.

Respectfully,

SCHENLEY IMPORT CORP.,
350 Fifth Ave., N. Y. C.
By PUCKHAFER, RODE & RODE, *Attorneys,*
Attorneys and Counselors at Law,
18 Bridge Street, New York City.

P.

5106. Schenley Import Corp. Cuban Rum-Cuban Tr. Agrt. W. H. 74. Received Mar. 9, 1939. Custom House, New York. Decision reviewed and affirmed. Harry M. Durning, Collector. Per May 5, 1939. 989463 G. Filed May 13, 1939. U. S. Customs Court. J. W. Dale, Clerk.

MEMORANDUM RE PROTEST NO. 5106

MAY 5, 1939.

Received 3/9 1939 (Art. 854 (b) C. R. 1937)

The alcoholic beverages in question are of the kind described in schedule 8 of the Tariff Act of 1930 and in Section 600 of the Revenue Act of 1918, as amended by the Liquor Taxing Act of 1934, which Act became effective January 12, 1934.

Duty was assessed at $2.50 less 20% per proof gallon under paragraph 802 of the Tariff Act of 1930, T. D. 47232–47667, for distilled spirits of the kind described by the Appraiser. Note paragraph 811 of the Tariff Act of 1930, "Each and every gauge or wine gallon of measurement shall be counted as at least one proof gallon."

There was assessed, in addition, a tax of $2.25 per proof gallon to accord with Section 2 of said Liquor Taxing Act, wherein it is provided that such distilled spirits shall be subject to a tax of $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

The protest was received within the statutory time.

Examiner's Initials:

V.

HARRY M. DURNING, *Collector.*
Per F. M. J. DUNNE.

Liquor "A."

989463–G. Filed May 13, 1939. U. S. Customs Court. J. W. Dale, Clerk.

STIPULATION

UNITED STATES CUSTOMS COURT, THIRD DIVISION

Protest No. 989463G/5106 on Int. Rev. Tax

SCHENLEY IMPORT CORP., *Plaintiff*

v.

THE UNITED STATES, *Defendant*

It is hereby stipulated and agreed by and between the parties hereto, subject to the approval of the court, as follows:

1. That the merchandise the subject of the above-entitled protest consists of rum in bottles containing each one gallon or less;

2. That the said rum is the growth, produce, or manufacture of the Republic of Cuba;

3. That the said rum was imported into the United States directly from the Republic of Cuba and entered for warehouse on July 1, 1938;

4. That the said rum was all withdrawn from warehouse on or before July 11, 1938.

It is further stipulated and agreed that the protest be deemed submitted on this stipulation and the plaintiff be allowed 60 days from the date of filing for brief and the defendant be allowed 60 days thereafter for a reply brief.

Dated, New York, June 9, 1941.

PUCKHAFER, RODE & RODE,
Attorneys for Plaintiff.

JOHN D. RODE,
CHARLES D. LAWRENCE,
Acting Assistant Attorney General,
Attorney for Defendant.

By RICHARD E. FITZ GIBBON,
Special Attorney.

Ordered Filed:
GENEVIEVE R. CLINE, *Judge.*

DECISIONS OF THE CUSTOMS COURT

Abstract 47420

UNITED STATES CUSTOMS COURT, THIRD DIVISION

SCHENLEY IMPORT CORP. *v.* UNITED STATES

Protest 989463–G–5106 against the decision of the collector of customs at the port of New York

Decided July 27, 1942

EKWALL, Judge: The importer, the plaintiff in this case, imported certain rum in bottles from Cuba. The bottles were allowed free entry as returned American merchandise. The rum was assessed at the rate of $2.50 per proof gallon less 20 percent under the provisions of paragraph 802 of the tariff act of 1930 as modified by the Cuban Trade Agreement of August 24, 1934 (49 Stat. 3559). The reduction of 20 percent was made because by the terms of the trade agreement between the United States and Haiti effective June 3, 1935, the rate of duty on rum in containers holding each one gallon

or less imported into the United States from Haiti was reduced to $2.50 per proof gallon from which rate Cuba was entitled to a 20 percent preferential.

There was also assessed a tax amounting to $2.25 per proof gallon under the provisions of section 710 of the Revenue Act of 1938.

A number of claims are set forth in the importer's pleadings but in the brief filed on behalf of the importer it is stated that while none of said claims is abandoned reliance is placed on the allegation that the amount of tax assessable under the revenue act of 1938 is $2.00 rather than $2.25 per proof gallon. This claim is made by virtue of article VIII of the Cuban Trade Agreement.

The case was submitted upon a stipulation which is in the following language:

> It is hereby stipulated and agreed by and between the parties hereto, subject to the approval of the court, as follows:
>
> 1. That the merchandise the subject of the above-entitled protest consists of rum in bottles containing each one gallon or less;
>
> 2. That the said rum is the growth, produce, or manufacture of the Republic of Cuba;
>
> 3. That the said rum was imported into the United States directly from the Republic of Cuba and entered for warehouse on July 1, 1938;
>
> 4. That the said rum was all withdrawn from warehouse on or before July 11, 1938.
>
> It is further stipulated and agreed that the protest be deemed submitted on this stipulation and the plaintiff be allowed 60 days from the date of filing for brief and the defendant be allowed 60 days thereafter for a reply brief.

Article VIII, supra, insofar as applicable to the issue here presented, is as follows:

> All articles enumerated and described in Schedule I annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the Republic of Cuba in effect on the day on which this Agreement comes into force; *and all articles enumerated and described in Schedule II annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.*

On the effective date of the Cuban Trade Agreement here involved, viz, September 3, 1934, the only tax imposed or required to be imposed by the federal laws of the United States of America on rum of the character of that here involved was a tax of $2.00 per proof gallon under the Liquor Taxing Act of 1934 (48 Stat. 313). This tax remained in effect until the passage of the Revenue Act of 1938 (52 Stat. 572) which, in section 710 thereof, increased the tax to $2.25 per proof gallon. This increase became effective July 1, 1938.

The question before us for determination is whether the increased rate of $2.25 imposed by the Revenue Act of 1938, supra, was applicable to the rum here imported.

A statement of the issue discloses that it is precisely the same as that involved in the recent case of *Rathjen Brothers* v. *United States*, decided July 1, 1942, 8 U. S. Cust. Ct., C. D. 659. We there upheld the contention of the plaintiff and held that the internal revenue tax assessable was that levied by the Liquor Taxing Act of 1934, viz, $2.00 per proof gallon. For the reasons expressed in the decision cited and under authority thereof, we sustain the instant protest to that extent.

Judgment will be rendered accordingly.

EKWALL, *J.*

Concurring:
CLINE, *J.*
KEEFE, *J.*

JUDGMENT

UNITED STATES CUSTOMS COURT, THIRD DIVISION

Suit No. 989463–G–5106

SCHENLEY IMPORT CORP., *Plaintiff*

vs.

UNITED STATES, *Defendant*

This case having been duly submitted for decision to the Third Division of the United States Customs Court, and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

It is hereby ordered, adjudged, and decreed that the protest insofar as it claims that rum imported from Cuba in containers holding each one gallon or less, which was withdrawn from warehouse on or before July 11, 1938, is subject to a tax of $2.00 per proof gallon under the Liquor Taxing Act of 1934, rather than $2.25 per gallon under section 710 of the Revenue Act of 1938, is sustained.

GENEVIEVE R. CLINE,
WILLIAM J. KEEFE,
WM. A. EKWALL,
Judges of the United States Customs Court.

Dated at New York, N. Y., this the 27th day of July 1942.

NOTICE OF MOTION

UNITED STATES CUSTOMS COURT, THIRD DIVISION

Protest 989463–G on Rum from Cuba

SCHENLEY IMPORT CORP., *Plaintiff*

v.

THE UNITED STATES, *Defendant*

Decided July 27, 1942

SIRS: Please take notice, that the undersigned hereby moves this Court for an order vacating and setting aside the decision and judgment herein and for a rehearing upon the grounds more specifically stated in the memorandum of Paul P. Rao, Assistant Attorney General in charge of Customs, annexed hereto and made a part hereof, and for such other and further relief as may be just in the premises.

Yours, etc.,

PAUL P. RAO,
Assistant Attorney General.
CJM

To: CLERK, U. S. CUSTOMS COURT,
New York, N. Y.
COLLECTOR OF CUSTOMS,
New York, N. Y.
PUCKHAFER, RODE & RODE, ESQS.,
18 Bridge Street, New York, N. Y.

MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING

UNITED STATES CUSTOMS COURT, THIRD DIVISION

Protest 989463–G on Rum from Cuba

SCHENLEY IMPORT CORP., *Plaintiff*

v.

THE UNITED STATES, *Defendant*

Decided July 27, 1942

The Government moves for a rehearing in the above entitled action for the reasons hereinafter set forth.

The decision was based upon the court's decision in the case of *Rathjen Bros.* v. *United States*, dated July 1, 1942, 8 Cust. Ct. —, C. D. 659. The Court in its decision in this case stated:

> A statement of the issue discloses that it is precisely the same as that involved in the recent case of *Rathjen Brothers* v. *United States*, decided July 1, 1942, 8 U. S. Cust. Ct. —, C. D. 659. We there upheld the contention of the plaintiff and held that the internal revenue tax assessable was that levied by the Liquor Taxing Act of 1934, viz, $2.00 per proof gallon. For the reasons expressed in the decision cited and under authority thereof, we sustain the instant protest to that extent.

The Government has already filed a motion for a rehearing in the *Rathjen Brothers* case, *supra*.

The grounds upon which the motion here is made are that the Court has apparently improperly construed the language of the Supplementary Trade Agreement with Cuba effective December 23, 1939 (T. D. 50050), in conjunction with and its bearing on the language contained in Article VIII of the Cuban Trade Agreement of August 24, 1934 (T. D. 47232), and further, that the Court's attention was not called to the decision in the case of *Mosle et al.* v. *Bidwell*, 130 Fed. 334, T. D. 25276.

It is argued in the defendant's main brief submitted herein, and in its brief submitted in the *Rathjen Brothers* case, *supra*, that Article III of the supplementary trade agreement with Cuba, *supra*, in amending Article VIII of the trade agreement with Cuba of August 24, 1934, *supra*, removed any doubt as to the interpretation to be given to said Article VIII as to the increase of any internal-revenue tax imposed upon imported merchandise in respect of a like tax on a like domestic article. The court, however, in its decision, held that since the supplementary trade agreement with Cuba, by Article III thereof, amended Article VIII of the former trade agreement with Cuba, that such amendment and such change of language showed a different or new intent. As evidence of such a new intent, the court quoted from "The Analysis of General Provisions and Reciprocal Benefits in the Supplementary Trade Agreement with Cuba." It is respectfully submitted that the quotation above referred to explains the change in language which was necessary not because of any change in intent or treatment but because there was a recognition of "the reasonableness of compensatory charges on imports when like domestic products are subjected to new or increased internal taxes imposed for bona fide revenue purposes."

Defendant respectfully contends that ofttimes subsequent legislation should be read together with prior legislation to show the import of the prior statute. The case at bar is such an instance, as is shown from the language of the Analysis quoted in the court's opinion.

In support of this contention defendant respectfully refers the Court to the case of *Mosle* v. *Bidwell*, *supra*. In that case the court stated (p. 335):

> The plaintiffs contended that the phrase "duties to which it may be subject by law at the time of withdrawal" should be construed to mean "duties no greater nor different than other like goods imported at the time of withdrawal would be subject to." The court held that the goods were subject to duty in the amount exacted of the plaintiffs when they were deposited in bond; that they remained so in the absence of any treaty or statute relieving them from duty; and that neither the treaty nor any statute passed subsequently to the one imposing the duty has impaired or affected the right to collect it.
>
> We need not discuss the several arguments which have been advanced in criticism and in support of this decision. *No principle of statutory construction is better settled than the one which holds that the intention of the Legislature, when discovered, must prevail*, any rule of construction declared by previous acts to the contrary notwithstanding. The following excerpts from *U. S.* v. *Freeman*, 3 How. 556, 11 L. Ed. 724, are apposite to the case at bar:
>
> "A legislative act is to be interpreted according to the intention of the Legislature apparent upon its face. * * * In doubtful cases a court should compare all parts of a statute and *different statutes in pari materia to ascertain the intent of the Legislature.* * * * *If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; and, if it can be gathered from a subsequent statute in pari materia what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.*"
>
> On December 15, 1902, Congress passed an act (chapter 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1903, p. 255]) amending section 20 of the customs administrative act, quoted above, by inserting before the existing proviso an additional proviso, as follows:
>
> "*Provided*, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of withdrawal."
>
> Ordinarily, such an amendment might be taken as indicating an intention to make some change in the existing law, but, although we may not inquire as to what individual members supposed a bill to mean, or what they intended to accomplish by their votes, we may consult the history of the act itself, and the reports of committees having it in charge, in order to reach a conclusion as to legislative intent. It appears that the bill was introduced in consequence of the apprehended results of the decision of the Circuit Court in the case at bar, and the committee on ways and means reported to the House on December 11, 1902, that "the bill simply endeavors to conform the language of the section to the primary meaning and intent of the law and to accord with the custom

and ruling of the Treasury Department." *Under the rule laid down in U. S. v. Freeman, supra, the later statute may be taken as declaratory of the meaning of the earlier one.* [Underscoring ours.]

We therefore respectfully submit that the decision and judgment herein should be vacated and set aside and that the motion for a rehearing should be granted.

Respectfully submitted.

PAUL P. RAO,
Assistant Attorney General.
CJM

CHARLES J. MIVILLE,
Special Attorney.
AUGUST 13TH, 1942.

MEMORANDUM IN OPPOSITION TO MOTION FOR REHEARING

UNITED STATES CUSTOMS COURT, THIRD DIVISION

Protest 989463G. Subject: Rum from Cuba

SCHENLEY IMPORT CORP., *Plaintiff*

v.

THE UNITED STATES, *Defendant*

Decided July 27, 1942

The plaintiff opposes the government's motion for rehearing herein. The government's motion is based on a supposed improper construction of the language of the Supplementary Trade Agreement with Cuba effective December 23, 1939 (T. D. 50050). *This Supplementary Trade Agreement, T. D. 50050, is not involved in the instant case.* The statutes in force at the time of this importation are the statutes to be considered in determining the proper rate of duty applicable to this merchandise. In the presence of clear and explicit enactment, canons of construction have no application. *Godillot & Co.* v. *The United States*, 2 Ct. Cust. Appls. 408, T. D. 32168; *United States* v. *McCord Brady* Co., 8 Ct. Cust. Appls. 208, T. D. 37437; *Allen Steel Co. Inc.* v. *United States*, 16 Ct. Cust. Appls. 26, T. D. 42715; *United States* v. *Littwitz, Inc.*, 18 C. C. P. A. (Customs) 341, T. D. 44588. The language used in Article VIII of the Cuban Trade Agreement of August 24, 1934, T. D. 47232, is clear and unambiguous. Under the circumstances, any reference to the Sup-

plementary Trade Agreement, T. D. 50050 or T. D. 50541, is clearly *obiter dicta* and cannot form any basis for a motion for rehearing.

The case of *Mosle* v. *Bidwell*, 130 Fed. 334, T. D. 25276, which the defendant now cites as authority for its contention is in no way applicable to this case. There is no necessity for resorting to canons of construction. The statute itself furnishes the best means of its own exposition. *Pulaski & Co.* v. *United States*, 6 Ct. Cust. Appls. 291, T. D. 35508. The intent of the lawmaker is the law, and to ascertain that intent courts are bound to have recourse first to the words of the law and, if their meaning be clear and unambiguous, there is no sound reason why that meaning should be rejected and a search made for some signification other than that which has been clearly expressed. *Akawo, Morimuri & Co.* v. *United States*, 6 Ct. Cust. Appls. 379, T. D. 35921.

Even if recourse is properly had to T. D. 50050 and T. D. 50541, the *Mosle* case, *supra*, is not controlling. Where subsequently enacted statutes include certain language, this is a legislative admission that the language of a former statute was not broad enough to include matters thus added. *United States* v. *Wells, Fargo & Co.*, 1 Ct. Cust. Appls. 158, T. D. 31211. A change of meaning is evidenced by a change in language. *Brick & Son* v. *United States*, 2 Ct. Cust. Appls. 26, T. D. 31576; *United States* v. *Brandenstein & Co.*, 17 C. C. P. A. (Customs) 480, T. D. 43941; *Cellas, Inc* v. *United States*, 18 C. C. P. A. (Customs) 237, T. D. 44405. Where a revising act changes the language used in the former act, one is put upon notice that a change in meaning might be intended; no rules of construction are to be resorted to when the meaning is plain. *Stroheim & Romann* v. *United States*, 13 Ct. Cust. Appls. 489, T. D. 41370.

The defendant has not offered to produce any new evidence in the event that its motion for rehearing is granted and has not offered any new argument which would justify the granting of this motion. If the defendant is dissatisfied with the decision, its proper remedy is by appeal.

The instant motion is clearly without merit and for the reasons stated herein, and on all the facts and the law, the motion should be denied.

Respectfully submitted.

PUCKHAFER, RODE & RODE,
Attorneys for Plaintiff.

HOWARD C. CARTER,
Of Counsel.

ORDER

UNITED STATES CUSTOMS COURT, THIRD DIVISION

Port of New York. Protest 989463–G–5106–39

SCHENLEY IMPORT CORP., *Plaintiff*

v.

THE UNITED STATES, *Defendant*

Decided July 27, 1942

Motion having been made by the United States, defendant herein, for a rehearing in the above entitled case, and memorandum in opposition thereto having been filed by Puckhafer, Rode & Rode, attorneys for the plaintiff herein, after due deliberation, it is hereby

Ordered and decreed that the said motion be and the same is hereby denied.

Dated: New York, N. Y., September 15, 1942.

GENEVIEVE R. CLINE,
WILLIAM J. KEEFE,
WM. A. EKWALL,
Judges of the United States Customs Court.

[Indorsed:] Filed December 10, 1942. United States Court of Customs and Patent Appeals. Arthur B. Shelton, Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1942

[fol. 16] UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Wednesday, April 21, 1943.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 21st day of April, A. D., 1943.

Present the Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Irvine L. Lenroot, and Joseph R. Jackson, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 4418

THE UNITED STATES, Appellant,

v.

RATHJEN BROTHERS, Appellee

Customs Appeal No. 4419

THE UNITED STATES, Appellant,

v.

SCHENLEY IMPORT CORP., Appellee

Said appeals came on to be heard before the court and after hearing the arguments of counsel the causes were taken under advisement by the court.

* * * * * * *

[fol. 17] UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, OCTOBER TERM, 1942

Customs Appeal No. 4419. Customs Calendar No. 41

THE UNITED STATES, Appellant,

v.

SCHENLEY IMPORT CORP., Appellee

JACKSON, Judge:

This is an appeal from a judgment of the United States Customs Court, Third Division, sustaining a protest by ap-

pellee against the assessment of an internal revenue tax of $2.25 per proof gallon under section 600 (a) of the Revenue Act of 1918 (40 Stat. 1057) as amended by section 710 of the Revenue Act of 1938 (52 Stat. 447), on rum in bottles each containing one gallon or less imported from Cuba into the port of New York and entered for warehouse July 1, 1938.

The rum was assessed with duty at the rate of $2.00 per proof gallon under the provisions of paragraph 802 of the Tariff Act of 1930 as modified by the Cuban Trade Agreement of August 24, 1934, T. D. 47232, and the Haitian Trade Agreement of March 28, 1935, T. D. 47667.

A number of claims were set forth in the protest but according to the decision of the trial court appellee relied there upon the claim that the amount of tax assessable on the imported merchandise under the Revenue Act of 1938 is $2.00 rather than $2.25 per proof gallon as assessed by [fol. 18] the collector. In this court appellee relies entirely upon that claim.

The issue here is identical with that in the case of United States v. Rathjen Brothers, 31 C. C. P. A. (Customs) —, C. A. D. —, decided concurrently herewith. In that case we reversed the judgment appealed from and held that section 710 of the Revenue Act of 1938 was absolutely irreconcilable with the provisions of Article VIII of the Cuban Trade Agreement of August 24, 1934, T. D. 47232. For the reasons therein set out and under the authority thereof the judgment in the instant case must be reversed.

The judgment of the United States Customs Court is reversed.

Reversed.

[fol. 19] UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Tuesday, July 6, 1943.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 6th day of July, A. D., 1943.

Present the Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, and Joseph R. Jackson, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 4419

THE UNITED STATES, Appellant,

v.

SCHENLEY IMPORT CORP., Appellee

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that the judgment of the United States Customs Court be, and the same is hereby, reversed, and it is held that the protest of the importer should be overruled; and said cause is remanded to said court for proper action in the premises.

* * * * * * *

[fol. 20] CERTIFICATE RE MANDATE OF COURT OF CUSTOMS AND PATENT APPEALS

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 4419

THE UNITED STATES, Appellant,

v.

SCHENLEY IMPORT CORP., Appellee

The final mandate in the above-entitled appeal, consisting of a certified copy of the order of the court of the 6th day of July, 1943, was issued to the United States Customs Court on the 11th day of August, 1943.

Arthur B. Shelton, Clerk.

[fol. 21] CERTIFICATE OF CLERK

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 4419

THE UNITED STATES, Appellant,

v.

SCHENLEY IMPORT CORP., Appellee

I, Arthur B. Shelton, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the

attached pages, numbered 1 to 20, inclusive, contain a true and complete transcript of the record and certain proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 15th day of September, A. D., 1943.

Arthur B. Shelton, Clerk. (Seal.)

(8056)

(37)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 405

SCHENLEY IMPORT CORPORATION,

Petitioner,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF

JOHN D. RODE,
Attorney for Petitioner.

NORMAN J. MORRISSON,
Of Counsel.

September, 1943.

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CITATIONS.

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. _____

SCHENLEY IMPORT CORPORATION,

Petitioner,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The Petitioner, Schenley Import Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered July 6, 1943 reversing a judgment of the United States Customs Court.

Opinions Below

The opinion of the United States Customs Court (R. 7, 8, 9) is reported in *Schenley Import Corporation* v. *United States,* 78 Treas. Dec. Advance Sheet No. 6, page 42, Abstract 47420.

The opinion of the United States Court of Customs and Patent Appeals (R. 16, 17) is reported in 31 C. C. P. A. (Customs) ——, C. A. D. 251, 79 Treas. Dec. Advance Sheet No. 8, page 39.

Jurisdiction

The judgment of the United States Court of Customs and Patent Appeals was entered on July 6, 1943 (R. 17, 18). The jurisdiction of this Court is invoked under Section 195 of the Judicial Code as amended (28 U. S. C. A. Section 308).

Questions Presented

(1) Whether Article VIII of the Cuban Trade Agreement of 1934 bound the tax on rum in bottles at the rate in force on the effective date of said trade agreement.

(2) Whether the subsequent enactment of Section 710, Revenue Act of 1938 was intended to contravene Article VIII of said Trade Agreement.

Statutes Involved

The pertinent provisions of the statutes and trade agreement involved are set forth in the appendix (*infra*, pp. 16, 17, 18).

Statement

A shipment of Cuban rum in bottles containing each one gallon or less was imported at the Port of New York and entered for warehouse on July 1, 1938, all of the rum being finally withdrawn for consumption on or before July 11, 1938.

Schedule II of the Cuban Trade Agreement of 1934 provided for rum in bottles containing each one gallon or less.

Article VIII of said Trade Agreement provided that articles enumerated in Schedule II "* * * shall be exempt

from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which the Agreement comes into force."

The said Trade Agreement became effective as to all items enumerated in Schedule II which were entered for consumption or withdrawn from warehouse for consumption on or after September 3, 1934. (See T. D. 47232.)

The only tax imposed or required to be imposed on rum by laws of the United States in effect on September 3, 1934 was a tax of $2.00 per proof gallon under the Liquor Taxing Act of 1934.

The tax of $2.00 per proof gallon remained in effect without increase until passage of the Revenue Act of 1938, when the tax was raised to $2.25 per proof gallon effective July 1, 1938.

The Collector of Customs applied the rate of $2.25 per proof gallon.

Rulings of the Court Below

The United States Customs Court held that the rum in question was subject to tax at the rate of $2.00 per proof gallon and that Section 710, Revenue Act of 1938 did not apply to the rum in the absence of an express intention in said Act to abrogate the terms of the Cuban Trade Agreement.

The United States Court of Customs and Patent Appeals reversed the United States Customs Court and held that the rum was subject to tax at $2.25 per proof gallon and that the Revenue Act of 1938 was in direct conflict with the Cuban Trade Agreement and being later in date superseded said agreement by clear implication.

Reasons for Granting Petition

1. The United States Court of Customs and Patent Appeals decided an important question of federal law which has not been, but which should be, settled by this Court, namely, the application of Section 710 Revenue Act of 1938 to Article VIII of the Cuban Trade Agreement of 1934.

2. The decision of the United States Court of Customs and Patent Appeals is not in accordance with the great weight of authority as to the application of the doctrine of repeal by implication.

3. The decision of the United States Court of Customs and Patent Appeals leaves meaningless and without scope an important and basic portion of an international agreement.

4. The decision of the United States Court of Customs and Patent Appeals involves a question of wide application involving substantial sums of money in the field of international reciprocal trade agreements.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

JOHN D. RODE,
Attorney for Petitioner.

NORMAN J. MORRISSON,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions

The opinion of the United States Customs Court is dated July 27, 1942 and was written by Judge Ekwall, with Judge Cline and Judge Keefe concurring. The decision appears on pages 7, 8 and 9 of the record and is reported in 78 Treas. Dec. Advance Sheet No. 6, page 42, Abstract 47420.

The opinion of the United States Court of Customs and Patent Appeals is dated July 6, 1943 and was written by Judge Jackson. The decision appears on pages 16 and 17 of the record and is reported in 31 C. C. P. A. (Customs) ——, C. A. D. 251, 79 Treas. Dec. Advance Sheet No. 8, page 39.

Jurisdiction

The jurisdiction of this Court is invoked under Section 195 of the Judicial Code as amended (28 U. S. C. A. Section 308). The judgment of the United States Court of Customs and Patent Appeals was entered on July 6, 1943 (R. 18) and the mandate was sent down on August 11, 1943 (R. 18).

Statement

The facts are stated briefly in the petition (pp. 2, 3) and will therefore not be repeated here.

ARGUMENT

I

By virtue of Article VIII of the Cuban Trade Agreement of 1934 (T. D. 47232) the imported rum is exempt from all taxes in excess of $2.00 per proof gallon under the Liquor Taxing Act of 1934.

The language of Article VIII is clear and unambiguous on its face and would seem to require no outside evidence to explain its meaning. Article VIII states that all articles enumerated and described in Schedule II with respect to which a rate of duty is specified in Column 2 shall be exempt from all taxes in excess of those imposed or required to be imposed under our laws in force on the effective date of the agreement.

Rum in bottles containing each one gallon or less is enumerated and described in Schedule II.

A rate of duty is specified in Column 2 for such rum—namely, $2.50 per proof gallon.

On the effective date of the Cuban Trade Agreement (September 3, 1934), the only tax on imported rum was a tax of $2.00 per proof gallon under the Liquor Taxing Act of 1934.

No other law subject to statutory control by the Federal Government of the United States of America imposed or required to be imposed any tax other than the above mentioned tax of $2.00 per proof gallon.

It is extremely doubtful if any clearer or more precise language could have been employed than the language found in Article VIII to express the manifest intention to freeze the tax on Cuban rum at $2.00 per proof gallon.

The third paragraph of Article VIII makes it equally clear that by such laws was meant laws subject to the

statutory control of the Federal Government of the United States of America, which is clearly the case here. It is interesting to note that this third paragraph is not limited to matters subject to the control of the President of the United States but to laws subject to the statutory control of the Federal Government.

A careful analysis of the whole Cuban Trade Agreement fails to reveal any provision which in the slightest degree effects or limits the clear and unequivocal concessions or guarantees of Article VIII.

II

Section 710 Revenue Act of 1938 was not intended to contravene Article VIII of the Cuban Trade Agreement of 1934.

The suggestion that Congress intended by the enactment of Section 710 of the Revenue Act of 1938 to impeach, supersede or otherwise contravene the solemn obligations of the Cuban Trade Agreement has no support in fact or in law and furthermore is not warranted by any sound rule of statutory construction.

The authority conferred by Congress on the President in enacting the Trade Agreements Act was amply broad to sustain a freezing of the internal revenue taxes and any other taxes on Cuban products. The authority of the President to continue to conclude trade agreements having three times been extended by Congress, once on March 1, 1937, again on April 12, 1940 and again on June 7, 1943 it must be presumed that Congress in effect ratified and approved the actions of the executive department in these matters.

Congress should certainly not be placed in the position of having given its consent to the President to freeze the Internal Revenue Tax on Cuban rum at $2.00 per

gallon and then by its own independent action violating a solemn international agreement.

In construing the application of Section 710 therefore this court should be loathe to favor a construction which would cause grave public inconvenience or injury or would lead to absurd consequences.

> *Bird* v. *United States*, 187 U. S. 118, 47 L. ed. 100;
> *Hawaii* v. *Mankichi*, 190 U. S. 197, 47 L. ed. 1016.

If the language of a statute is capable of two interpretations, one of which works manifest injustice, and the other works no injustice, the latter must prevail.

> *Beal's Cardinal Rules of Legal Interpretations*, page 397;
> *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, 53 L. J. Ch. 842.

Laws of Congress should receive a sensible construction and general terms should be limited in application so as not to lead to injustice or oppression. Consequently, it will be presumed that the legislature intended exceptions to its language which would avoid such results.

> *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278.

The Revenue Act of 1938 was a broad, general revenue act and contains no specific reference to either the Trade Agreements Act or to any particular trade agreement concluded thereunder. Congress not having expressly repealed or modified Article VIII of the Cuban Trade Agreement, any supposed modification or repeal must be the result of implication.

It is a well established rule of construction that repeal by implication is not favored.

> *Wood County* v. *Lackawanna Iron & Coal Co.*, 93 U. S. 619, 23 L. ed. 989;
> *Arthur* v. *Homer*, 96 U. S. 137, 24 L. ed. 811;
> *Maxwell's Interpretation of Statutes*, Eighth Ed., page 147.

Moreover, where repeal by implication would lead to absurd consequences or where the statute is an important one relating to a government matter, the implication to repeal must be clear, necessary and irresistible.

> *Wood* v. *United States*, 16 Pet. 342, 10 L. ed. 987;
> *Beals* v. *Hale*, 4 How. 37, 11 L. ed. 865;
> *Henderson's Tobacco*, 11 Wall 652, 20 L. ed. 235.

It seems unreasonable to suppose that Congress intended by doubtful inference to repeal or contravene Article VIII of the Cuban Trade Agreement and thus disturb the solemn obligation entered into between the executive department and the republic of Cuba in this vital field of international trade relationships.

> *Fussell* v. *Gregg*, 113 U. S. 550, 28 L. ed. 993.

This is particularly true in view of the fact that the Rvenue Act of 1938 was a broad, general revenue act relating to many classes and kinds of taxes for general revenue purposes and has no relation whatsoever to the conduct of our international relations with the Republic of Cuba.

The dangers of assuming congressional intent to repeal by doubtful inference or implication has given rise to a well established exception in cases where the subject of the earlier legislation is special in nature and the subsequent legislation general.

In such cases it has uniformly been held that a prior special statute is not repealed by a subsequent general statute unless by express reference or necessary implication.

Re Kang-Gi-Shun-Ça, 109 U. S. 556, 27 L. ed. 1030;
Cass County v. *Gillett,* 100 U. S. 585, 25 L. ed. 585;
United States v. *Claflin,* 97 U. S. 546, 24 L. ed. 1082;
Crawford on Statutory Construction, page 430;
Maxwell's Interpretation of Statutes, Eighth Ed., pages 156 to 159;
Beal's Cardinal Rules of Legal Interpretations, pages 579, 520.

"It is a rule that posterior laws repeal prior ones to the contrary. But the rule is subject to a qualification excellently, as it seems to me, expressed by Sir P. B. Maxwell in his book on the interpretation of statutes. He says at page 157 (First Edition) under the heading 'Generalia Specialibus non derogant', 'It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that a general act is to be construed as not repealing a particular one by mere implication. A general later law does not abrogate an earlier special Act; or, what is the same thing by custom. Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless it manifests that intention in explicit language' ".

Garnett v. *Bradley* (1877), 2 Ex. D. 349, 46 L. J. Ex. 545.

The wisdom of this exception is particularly well illustrated by the facts presented in the instant case. The prior statute or trade agreement related solely to our trade relations with the Republic of Cuba and Article VIII of said agreement clearly and unequivocally froze the tax on Cuban rum. The later statute, namely the Revenue Act of 1938, was a broad, general revenue raising enactment, dealing with income taxes, estate taxes, gift taxes, manufacturer's excise taxes, miscellaneous taxes, taxes on transfers to avoid income taxes, postal rates as well as many administrative provisions. It is certain the Congress did not manifest a clear intention in explicit language such as would permit the repeal of Article VIII by implication.

In the case of *Cook* v. *United States*, 288 U. S. 102, 77 L. ed. 641, a treaty of May 22, 1924 with Great Britain provided for a complete method for dealing with the search and seizure beyond our territorial limits of British vessels suspected of smuggling intoxicating liquors into this country. In holding that the treaty was not abrogated by the later reenactment of Section 581, Tariff Act of 1930 and in dismissing two libels against a vessel and its cargo, the court, at pages 119, 120, stated as follows:

> "The Treaty was not abrogated by reenacting Section 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. *Chew Heong* v. *United States*, 112 U. S. 536; *United States* v. *Payne*, 264 U. S. 446, 448. Here, the contrary appears. The committee reports and the debates upon the Act of 1930, like the reenacted section itself, makes no reference to the Treaty of 1924."

That ample grounds exist for believing that Congress never intended to contravene Article VIII, of the Cuban

Trade Agreement, but did in fact intend Cuban products to always be treated upon a preferential basis is clearly demonstrated by the history of the trade relations between our country and the Republic of Cuba.

This preferential treatment existed as far back as the Cuban Reciprocity Treaty of 1902 and continues to exist today. In the Act to Amend the Tariff Act of 1930 approved June 12, 1934, known as the Trade Agreements Act, Section 350 (b) specifically provides as follows:

> "(b) Nothing in this section shall be construed to prevent the application, with respect to rates of duty established under this section pursuant to agreements with countries other than Cuba, of the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under this section, modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba: *Provided,* That the duties payable on such an article shall in no case be increased or decreased by more than 50 per centum of the duties now payable thereon."

Here again Congress itself particularly recognized that products of Cuban origin would be entitled to privileges not accorded to products originating in other countries.

Furthermore an examination of the various trade agreements concluded by the President under the Trade Agreements Act clearly shows that the preferential treatment accorded Cuban products was zealously protected in dealing with other countries. The trade agreements concluded with Belgium (T. D. 47600 effective May 1, 1935); with Haiti (T. D. 47667 effective June 3, 1935); with Sweden (T. D. 47785 effective August 5, 1935); with Brazil (T. D. 48034 effective January 1, 1936); with Canada (T. D. 48033 effective January 1, 1936); with the Netherlands (T. D. 48075 effective February 1, 1936);

with Switzerland (T. D. 48093 effective February 15, 1936); with Honduras (T. D. 48131 effective March 2, 1936); with Columbia (T. D. 48258 effective May 20, 1936); with France (T. D. 48316 effective June 15, 1936); with Guatemala (T. D. 48317 effective June 15, 1936); with Nicaragua (T. D. 48511 effective October 1, 1936); with Finland (T. D. 48554 effective November 2, 1936); with El Salvador (T. D. 48947 effective May 31, 1937); with Costa Rica (T. D. 49072 effective August 2, 1937); with Czechoslovakia (T. D. 49458 effective April 16, 1938); with Ecuador (T. D. 49710 effective October 23, 1938); with Canada (T. D. 49752 effective January 1, 1939); with the United Kingdom (T. D. 49753 effective January 1, 1939); with Turkey (T. D. 49838 effective May 5, 1939); with Venezuela (T. D. 50015 effective December 16, 1939); with the Argentine (T. D. 50504 effective November 15, 1941) and with Mexico (T. D. 50797 effective January 30, 1943), all contain express provisions stating that the advantages now accorded or hereafter accorded by the United States to the Republic of Cuba are excluded from the operations of the various trade agreements with said countries.

Furthermore, the Court of Customs and Patent Appeals has frequently recognized and enforced without fail the obvious treatment of Cuban products on a preferred basis.

F. H. Van Damm v. *United States,* 25 C. C. P. A. (Customs) 97, T. D. 49094; cert. den. 302 U. S. 722;

Louis Wolf & Co. v. *United States,* 27 C. C. P. A. (Customs) 188, C. A. D. 84;

Geo. W. Cole & Co. v. *United States,* 27 C. C. P. A. (Customs) 201, C. A. D. 85;

D. & B. Import Corp. v. *United States,* 29 C. C. P. A. (Customs) 65, C. A. D. 172;

B. & J. Burke, Ltd. v. *United States,* 26 C. C. P. A. (Customs) 374, C. A. D. 44.

Since it is clear from the history of our trade relations with the Republic of Cuba that Congress has always accorded preferential treatment to the products of that country, a fact which the courts have also frequently recognized, it is submitted that Congress never intended Section 710 to in any way modify or repeal Article VIII of the Cuban Trade Agreement Had Congress so intended, it seems manifest that it would have used clear and unequivocal language to express such departures from established treatment.

Congressional intent to repeal being wholly lacking, the court should therefore construe Article VIII and Section 710, together and give effect to both. By excluding the Cuban Rum in the case at bar from the increase provided for by Section 710, the court can continue to give effect to Article VIII in accordance with the expressed intentions of the Congress as well as the parties to the Cuban Trade Agreement, without by any means rendering inoperative or without application Section 710 of the Revenue Act of 1938.

United States v. *Kirby, supra;*
Cook v. *United States, supra.*

In the case of *United States* v. *Lee Yen Tai,* 185 U. S. 213, 46 L. ed. 878, this court reconciled a subsequent treaty with a prior act of Congress relating to the deportation of Chinese laborers. In so doing, the court stated as follows:

> "In *Frost* v. *Wenie,* 157 U. S. 46, 58, this court said:
>
> 'It is well established that repeals by implication are not to be favored. And when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both' ".

On many occasions this court has considered special laws as exceptions to general statutes, whether passed before or after such general enactments.

Washington v. *Miller,* 235 U. S. 422, 59 L. ed. 295;
Rodgers v. *United States,* 185 U. S. 83, 46 L. ed. 816.

CONCLUSION

It is respectfully submitted that the judgment of the court below is erroneous and that the petition herein should be granted.

September, 1943.

JOHN D. RODE,
Attorney for Petitioner,

NORMAN J. MORRISSON,
of Counsel.

Appendix

Article VIII Cuban Trade Agreement of 1934 reads in part as follows:

> "All articles enumerated and described in Schedule I annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the Republic of Cuba in effect on the day on which this Agreement comes into force; and all articles enumerated and described in Schedule II annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.
>
> "The provisions of this Article insofar as they apply to taxes, fees, charges, or exactions imposed within the United States of America, shall apply only to such taxes, fees, charges, or exactions as are subject to statutory control by the Federal Government of the United States of America."

The Liquor Taxing Act of 1934 (Public—No. 83—73d Congress H. R. 6131) Section 2, Title I provides as follows:

> "Sec. 2. Paragraphs (3) and (4) of subdivision (a) of section 600 of the Revenue Act of 1918, as amended (relating to the tax on distilled spirits generally and the tax on distilled spirits diverted for beverage purposes) (U. S. C., Sup. VI, title 26, Sec. 1150(a)(1) and (2), are amended to read as follows:
>
> "(3) On and after January 1, 1928, and until the effective date of Title I of the Liquor Taxing Act of 1934, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and

"(4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon."

The Liquor Taxing Act of 1934 became effective January 12, 1934, one day after its passage on January 11, 1934.

The Act of February 24, 1919 (known as the Revenue Act of 1918), C. 18, Sec. 600(a)(4), Title VI, provided as follows:

"That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law."

The Act of February 26, 1926, C. 27, Sec. 900 (44 Stat. 104) Title IX, amended the above law by reducing the tax on and after January 1, 1927 to $1.65 and by further reducing the tax on and after January 1, 1928 to $1.10 per gallon as to non-beverage uses. As to distilled spirits diverted to beverage purposes, the tax of $6.40 was retained, to be paid by the person responsible for such diversion.

The above provisions remained unchanged until passage of the Liquor Taxing Act of 1934, *supra*.

Appendix.

The tax of $2.00 per proof gallon under the Liquor Taxing Act of 1934 remained in effect without increase until passage of the Revenue Act of 1938 (Public—No. 554—75th Congress, Chapter 289, 3d Session H. R. 9682). Section 710 of this act provided as follows:

> (a) Section 600 (a)(4) of the Revenue Act of 1918, as amended, is amended to read as follows:
>
> "(4) On and after January 12, 1934, and until July 1, 1938, $2.00, and on and after July 1, 1938, $2.25, on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon."
>
> (b) Section 600 (c) of such Act, as amended, is amended by striking out "$2.00 per wine gallon" and inserting in lieu thereof "$2.25 per wine gallon".
>
> (c) Section 4 of the Liquor Taxing Act of 1934 is amended by striking out "$2.00" and inserting in lieu thereof "$2.25".
>
> (d) The amendments made by this section shall not apply to brandy and the rates of tax applicable to such brandy shall be the rates applicable without regard to such amendments.

The Revenue Act of 1938 became effective on May 16, 1938 and Section 710 thereof took effect on July 1, 1938.

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555626—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 405

SCHENLEY IMPORT CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Customs Court (R. 7–9) is reported in Abstract 47420, 78 Treasury Decisions Advance Sheets, August 6, 1942, page 42. The opinion of the Court of Customs and Patent Appeals (R. 16–17) is reported in 79 Treasury Decisions Advance Sheets, August 19, 1943, page 39.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on July 6, 1943 (R. 18). The petition for a writ of cer-

tiorari was filed on September 30, 1943. The jurisdiction of this Court is invoked under Section 195 of the Judicial Code, as amended, 28 U. S. C., Section 308.

QUESTION PRESENTED

Whether Section 710 of the Revenue Act of 1938 (*infra,* p. 11), increasing the internal revenue tax on imported distilled spirits twenty-five cents per proof gallon superseded Article VIII of the trade agreement between the United States and Cuba (*infra,* pp. 11–12), which provided that the articles enumerated in Schedule II annexed to the agreement (including rum in bottles containing each one gallon or less), should be exempt from all taxes in excess of those in force on the effective date of the agreement, September 3, 1934.

STATUTES INVOLVED

The relevant provisions of the several revenue Acts involved and of the trade agreement between the United States and Cuba are set forth in the Appendix, *infra,* pp. 9–25.

STATEMENT

On August 24, 1934, the United States and the Republic of Cuba entered into a reciprocal trade agreement which became effective September 3, 1934, fixing rates of duties on various articles of merchandise imported into the United States from Cuba, including rum in bottles containing

each one gallon or less (49 Stat. 3559). Article VIII of the said trade agreement provided that the articles of merchandise (including the rum) enumerated in Schedule II annexed thereto, with respect to which a rate of duty was specified in Column 2, should be exempt from all taxes, fees, charges, or exactions, in excess of those imposed by the laws of the United States in effect on the day on which the agreement should come into force (*infra,* p. 11). On September 3, 1934, the effective date of the agreement, Section 600 (a) (4) of the Revenue Act of 1918 (40 Stat. 1105), as amended by the act of February 26, 1926 (44 Stat. 104), and by Section 2 of the Liquor Taxing Act of 1934 (48 Stat. 313), provided for an internal revenue tax of $2.00 per proof gallon on imported distilled spirits (*infra,* pp. 9–10). Subsequent to the effective date of the trade agreement Section 600 (a) (4) of the Revenue Act of 1938 was further amended by Section 710 of the Revenue Act of 1938 (52 Stat. 572), and the internal revenue tax on all imported distilled spirits, except brandy, was increased from $2.00 to $2.25 per proof gallon (*infra,* p. 11).

On July 1, 1938, the effective date of Section 710, the petitioner imported into the United States at the Port of New York from Cuba certain rum in bottles containing each one gallon or less and entered the same for warehouse (R. 8). The rum was withdrawn from the ware-

house for consumption on or before July 11, 1938, and the Collector of Customs, in addition to the regular duty, concerning which there is no controversy, assessed an internal revenue tax of $2.25 per proof gallon thereon pursuant to Section 600 (a) (4) of the Revenue Act of 1918, as amended by Section 710 of the Revenue Act of 1938 (R. 8).

The petitioner filed a protest against the assessment of the additional twenty-five cents per proof gallon on the rum, contending that the increased amount was illegally assessed due to the fact that Article VIII of the Cuban Trade Agreement exempted the rum from all internal revenue taxes in excess of the $2.00 per proof gallon, the amount imposed by the laws of the United States on the effective day of the agreement (R. 4–5).

The United States Customs Court sustained the protest, holding that the increase of twenty-five cents per proof gallon in the internal revenue tax did not apply to the rum involved for the reason that the terms of the Cuban Trade Agreement exempted such rum from internal revenue taxes in excess of $2.00 per proof gallon, that being the amount imposed on the effective date of the trade agreement (R. 7–9). The Customs Court based its judgment in this case on its decision in the case of *Rathjen Brothers* v. *United States,* reported in 78 Treasury Decisions Advance Sheets, July 16, 1942, page 16, a copy of

which decision is set forth in the Appendix (*infra*, pp. 19–25).

The Court of Customs and Patent Appeals reversed the judgment of the Customs Court (R. 16–17) on the grounds that Section 710 of the Revenue Act of 1938 was absolutely irreconcilable with the provisions of Article VIII of the Cuban Trade Agreement; that the statute being later in time superseded the provisions of Article VIII of the trade agreement with respect to the rum involved; and that the Congress, when enacting Section 710 of the Revenue Act of 1938, did not intend the Cuban rum involved to be exempt from the increase in the internal revenue tax. The Court of Customs and Patent Appeals also based its judgment in this case on its decision in the companion case of *United States* v. *Rathjen Brothers*, reported in 79 Treasury Decisions Advance Sheets, August 19, 1943, page 35, a copy of which decision is also set forth in the Appendix (*infra*, pp. 12-19).

ARGUMENT

The rule of construction that a subsequent Act of the Congress will be held to supersede a prior inconsistent treaty, which was applied to the statute and trade agreement by the court below in reversing the Customs Court, is well established. *Rainey* v. *United States*, 232 U. S. 310, 316; *Whitney* v. *Robertson*, 124 U. S. 190, 194; *Hijo* v. *United States*, 194 U. S. 315, 324. The court did

not ignore the other equally well-established rule of construction that a subsequent Act of the Congress should, if possible, be harmonized with a prior inconsistent treaty or other international agreement. After expressly mentioning the latter rule (*infra*, p. 16), the court found that Section 710, which levied a tax of $2.25 per proof gallon on all distilled spirits imported into the United States,[1] was irreconcilably in conflict with the provisions of Article VIII of the Cuban Trade Agreement, and could not be harmonized with the latter without reading into the statute a destructive exception which was not there. The court then reached the conclusion that the Congress, at the time it enacted the Revenue Act of 1938, had in mind the international obligations of the United States, pointing out significantly that in Section 704 of that Act the Congress, in changing the manner of measuring lumber for tax purposes, which increased the tax, had exempted from the change all lumber upon which an increased tax would be in conflict with any international obligation of the United States.[2] Section 704 (b) reads as follows:

> Each sentence of the amendment made by subsection (a) shall become effective (1) on the sixtieth day after the date of the enactment of this Act *unless in conflict with*

[1] Brandy was excepted from the increase in the tax.

[2] In section 22 (b) (7) of the same act, the Congress excluded from taxation "income of any kind, to the extent required by any treaty obligation of the United States."

> *any international obligation of the United States* or (2) if so in conflict, then on the termination of such obligation otherwise than in connection with the undertaking by the United States of a new obligation which continues such conflict. [Italics supplied.]

From this the court deduced that the Congress intended that the increased tax should be assessed under Section 710 on Cuban rum notwithstanding Article VIII of the Cuban Trade Agreement, since the Congress, had it intended otherwise, would have expressly so provided as it did in the case of lumber in Section 704 of the same act. Thus, in the final analysis, the decision of the court below was based on the fundamental principle that in the construction of a statute the intention of the legislature must prevail. The construction placed by the court below on the statute is sound, both because the statute is clearly in conflict with the trade agreement and being later in time must prevail, and because the intention of the Congress, to increase the tax on distilled spirits despite conflicting provisions in international obligations, is reflected from the fact that in the same Act it expressly saved international oligations when it desired to do so in connection with internal revenue taxes on imported lumber. The rum involved was imported and withdrawn from the warehouse after Section 710 of the Revenue Act of 1938 became effective, and there are no other questions concerning its taxability.

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CONCLUSION

The decision of the court below is clearly correct, and there are no conflicts of decision. Furthermore, article VIII of the Cuban Trade Agreement of 1934 has been modified by the Supplementary Agreement of December 23, 1941 (55 Stat. 1449), and now expressly provides that either party may impose "at any time on the importation of any article a charge equivalent to an internal tax imposed in respect of a like domestic article."[3] The case is not, therefore, of large public importance. The petition is without merit and should be denied.

Respectfully submitted.

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OCTOBER 1943.

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[3] A similar understanding was reached in an exchange of notes, signed April 25, 1942 (56 Stat. 1497), in connection with the Haitian Trade Agreement (49 Stat. 3737), which also fixed new rates of duty on rum, and contained provisions similar to those in Article VIII of the original Cuban Agreement.

APPENDIX

STATUTES

Revenue Act of 1918, 40 Stat. 1105:

> SEC. 600. (a) That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or *imported into the United States,* * * * a tax of $2.20 * * * on each proof gallon, * * * to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. [Italics ours.]

Revenue Act of 1926, 44 Stat. 104:

> SEC. 900. Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:
>
> "SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or *imported into the United States,* in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:
>
> * * * * *
>
> "(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.
>
> * * * * *

"(5) The internal revenue tax imposed by this subdivision upon distilled spirits heretofore or hereafter imported into the United States shall, under regulations prescribed by the Commissioner, with the approval of the Secretary, be collected and deposited in the same manner as other internal revenue taxes, except that such collection and depositing shall be by the collector of customs instead of by the collector of internal revenue. Such tax shall be in addition to any customs duty imposed under the Tariff Act of 1922 or any subsequent Act. [Italics ours.]

Liquor Taxing Act of 1934, 48 Stat. 313:

SEC. 2. Paragraphs (3) and (4) of subdivision (a) of section 600 of the Revenue Act of 1918, as amended (relating to the tax on distilled spirits generally and the tax on distilled spirits diverted for beverage purposes) [U. S. C., Sup. VI, title 26, sec. 1150 (a) (1) and (2)], are amended to read as follows:

"(3) On and after January 1, 1928, and until the effective date of Title I of the Liquor Taxing Act of 1934, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and

"(4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon."

Revenue Act of 1938, 52 Stat. 572:

SEC 710. *Tax on Distilled Spirits.*

(a) Section 600 (a) (4) of the Revenue Act of 1918, as amended, is amended to read as follows:

"(4) On and after January 12, 1934, and until July 1, 1938, $2.00, and on and after July 1, 1938, $2.25, on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon."

(b) Section 600 (c) of such Act, as amended, is amended by striking out "$2.00 per wine gallon" and inserting in lieu thereof "$2.25 per wine gallon."

(c) Section 4 of the Liquor Taxing Act of 1934 is amended by striking out "$2.00" and inserting in lieu thereof "$2.25."

(d) The amendments made by this section shall not apply to brandy and the rates of tax applicable to such brandy shall be the rates applicable without regard to such amendments.

TRADE AGREEMENT—CUBA

August 24, 1934—T. D. 47232 (49 Stat. 3559).

ARTICLE VIII

All articles the growth, produce, or manufacture of the United States of America or the Republic of Cuba, shall, after importation into the territory of the other country, be exempt from national or federal internal taxes, fees, charges or exactions, other or higher than those payable on like articles of national or any other foreign origin.

* * * and all articles enumerated and described in Schedule II annexed to this Agreement,

with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges or exactions in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.

Supplementary Trade Agreement with Cuba

(55 Stat. 1449)

Effective January 5, 1942

ARTICLE IV * * * 3. The last paragraph of Article VIII of the Agreement of August 24, 1934, as amended, is amended to read as follows:

> The provisions of this Agreement shall not prevent the Government of either country from imposing at any time on the importation of any article a charge equivalent to an internal tax imposed in respect of a like domestic article or in respect of a commodity from which the imported article has been manufactured or produced in whole or in part.

United States Court of Customs and Patent Appeals, October Term, 1942

Customs Appeal No. 4418

UNITED STATES *v.* RATHJEN BROTHERS

(c. a. d. 250)

JACKSON, *Judge,* delivered the opinion of the court:

This is an appeal by the United States from a judgment of the United States Customs Court, Third Division, sustaining a protest of appellee against the assessment of an internal revenue tax of $2.25 per proof gallon under section 600 (a) of the Revenue Act of 1918 (40 Stat. 1057) as amended by section 710 of the Revenue Act of 1938 (52 Stat. 447), on 55 cases of rum in bottles of 1 gallon or less imported at the port of San Francisco from Cuba and entered for warehouse on May 11, 1938. The imported merchandise was assessed with duty at the rate of $2 per proof gallon under the provisions of paragraph 802 of the Tariff Act of 1930 as modified by the trade agreements with Cuba dated August 24, 1934, T. D. 47232, and with Haiti, dated March 28, 1935, T. D. 47667. That assessment was not protested.

The involved merchandise was withdrawn from warehouse on the sixth and fourteenth days of July 1938.

Appellee contended that the involved merchandise was properly assessable with an internal revenue tax of $2 per proof gallon, which was the rate in effect at the time the Cuban Trade Agreement signed August 24, 1934, went into effect, September 3, 1934.

The issue was whether the internal revenue tax as assessed by the collector under said revenue act, which became effective on July 1, 1938, was lawful in view of the Cuban Trade Agreement.

In its decision the trial court agreed with the contention of appellee and rendered judgment accordingly.

The issue for determination here is whether the increased internal revenue tax as provided for in

said section of the revenue act was legally assessable on the involved merchandise.

Section 600 (a) of the Revenue Act of 1918 (40 Stat. 1057, 1105) as far as here pertinent reads as follows:

> Sec. 600. (a) That there shall be levied and collected *on all distilled spirits* now in bond or that have been or that may be hereafter produced in or *imported into the United States,* * * * a tax of $2.20 * * * on each proof gallon, * * * to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. [Italics ours.]

The Revenue Act of 1926 (44 Stat. 9), in paragraph 900, amended section 600 (a) of the Revenue Act of 1918 insofar as pertinent here, by changing the tax of $2.20 per proof gallon to $1.10.

The Liquor Taxing Act of 1934 (48 Stat. 313) in section 2 (4) thereof, as far as pertinent here, amended the said section of the Revenue Act of 1918 amended as aforesaid, by increasing the tax to $2 on each proof gallon on and after the effective date of title I of the Liquor Taxing Act of 1934, January 12, 1934.

Section 710 of the Revenue Act of 1938 (52 Stat. 447, 572), effective July 1, 1938, as far as pertinent here, in subdivision (a) (4) thereof amended the Revenue Act of 1918 as amended by increasing the tax from $2 to $2.25 per proof gallon.

It is clear that on July 6 and July 14, 1938, the dates upon which the involved merchandise was withdrawn from warehouse, the revenue laws provided that *all distilled spirits* produced in or im-

ported into the United States when withdrawn from warehouse were subject to a tax of $2.25 per proof gallon.

Article VIII of the Cuban Trade Agreement of August 24, 1934, T. D. 47232, as far as pertinent here, reads as follows:

> All articles the growth, produce, or manufacture of the United States of America or the Republic of Cuba, shall, after importation into the territory of the other country, be exempt from national or federal internal taxes, fees, charges, or exactions, other or higher than those payable on like articles of national or any other foreign origin.
>
> * * * * * * * *
>
> and all articles enumerated and described in Schedule II annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges, or exactions, in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.

Schedule II provides that rum, in bottles containing each 1 gallon or less, shall be subject to a net tax of $2 per proof gallon.

Appellant contends here that the tax provided for in the Revenue Act of 1938 clearly conflicts and cannot be harmonized with the quoted provisions of the Cuban Trade Agreement of 1934 and therefore effect cannot be given to both, and the act being later in date must prevail.

Appellant argues that the Congress was presumed to have enacted the said revenue act with

knowledge of the existence of the said trade agreement and that the duty is "admittedly applicable to domestic rum and all other distilled spirits whether imported or domestic." Appellant in its brief contends that if the Congress had intended to exclude from the revenue act merchandise such as involved here, imported from Cuba, "it would have by clear language *excepted* Cuba from the provisions of a statute that was so general in its application." The appellant further contends that article III of the supplementary trade agreement with Cuba dated December 18, 1939, T. D. 50050, amending article VIII of the 1934 agreement, indicates the intent of the parties to the former agreement and may be taken as declaratory of the meaning of it.

Appellee contends that the statute and agreement must be construed, if possible, so as to give effect to both, citing the case of *Whitney* v. *Robertson,* 124 U. S. 190, 194; that the statute applies to all distilled spirits except rum packed in bottles containing 1 gallon or less imported from Cuba or certain other countries; that there is no indication that the Congress intended to increase the internal revenue tax on the involved merchandise and that no such intention should be found unless clearly expressed or implied, citing the case of *United States* v. *Lee Yen Tai,* 185 U. S. 213, 222; that since the statute does not specifically relate to rum packed in bottles containing 1 gallon or less it can be harmonized by applying it to all other distilled spirits, citing the case of *Ropes* v. *Clinch,* 8 Blatchf. 304, Fed. Cases 12,041; that the Congress is presumed to have enacted the statute with knowledge of the exist-

ence of the agreement and therefore an intention to supersede the agreement should be expressly indicated or the language of the statute should be so clear as not to permit of any other construction, citing the case of *John T. Bill Co., Inc., et al.* v. *United States,* 27 C. C. P. A. (Customs) 26, C. A. D. 57, and that the said supplementary trade agreement with Cuba represents a change in policy and is not retroactive.

It is clear as heretofore mentioned that at the time of importation, May 11, 1938, the internal revenue tax attaching to the merchandise was $2 per gallon. It is also clear that at the time the involved merchandise was withdrawn from warehouse the internal revenue tax covering *all distilled spirits* was $2.25 per gallon.

The parties are not in disagreement as to the law, and the principles of law involved in the cases cited by both are not questioned under the facts appearing therein. The issue upon which the parties split in their conclusions is whether or not the said revenue act expressly or by plain implication is so irreconcilably in conflict with the Cuban Trade Agreement of 1934 that being later in date its provisions should govern with respect to the taxing of the involved merchandise.

It is further agreed by the parties that the rule of law applicable to the provisions of a treaty being superseded by a subsequent act of Congress also applies with respect to other kinds of international agreements, such as the Cuban Trade Agreement.

The trial court, in its opinon, held that the Congress when enacting the involved revenue act was presumed to have had knowledge of the

terms of the Cuban Trade Agreement. Both parties agree with that holding and so does this court. With that knowledge, the Congress, in enacting section 710 of the Revenue Act of 1938, imposed a tax of $2.25 per proof gallon "on *all distilled spirits* now in bond or that have been or that may hereafter be produced in or *imported into the United States.*" When the Congress enacted the statute providing that *all distilled spirits imported into the United States* should be subject to an internal revenue tax of $2.25 per proof gallon it certainly must have intended to include imported rum regardless of the size of the containers and regardless of the country from which exported. If we were to hold that the involved merchandise is excepted from the said statute by reason of the quoted provision of the Cuban Trade Agreement of 1934, we would read an exception into the statute, thereby nullifying that portion of the act levying an internal revenue tax on *all distilled spirits imported into the United States.*

It appears to us from the wording of the statute and article VIII of the Cuban Trade Agreement of 1934 that with respect to the issue here the two are absolutely irreconcilable and that therefore the subsequent legislation supersedes by clear implication the quoted portion of that agreement. *Rainey* v. *United States,* 232 U. S. 310, 316; *Whitney* v. *Robertson, supra,* at page 194; *Hijo* v. *United States,* 194 U. S. 315, 324.

We are fortified in our conclusion that the Congress intended by the provisions of the said revenue act to include the involved merchandise as taxable for internal revenue purposes as here-

inbefore set out by the manner in which it worded section 704 of the same act in providing for a tax on lumber, as follows:

> (b) Each sentence of the amendment made by subsection (a) shall become effective (1) on the sixtieth day after the date of the enactment of this Act *unless in conflict with any international obligation of the United States* or (2) if so in conflict, then on the termination of such obligation otherwise than in connection with the undertaking by the United States of a new obligation which continues such conflict. [Italics ours.]

From the above-quoted language it is plain to us that the Congress in enacting the said revenue act had clearly in mind the international obligations of the United States such as the one here involved, and if it had intended that merchandise from Cuba such as in the instant case was to be excepted from the scope of that act it would have so stated as it did with respect to the tax on lumber.

In view of our conclusion it is not necessary to discuss the trade agreement with Haiti of March 28, 1935, T. D. 47667, the supplementary trade agreement with Cuba of December 18, 1939, T. D. 50050, or the cases cited by appellee.

For the reasons herein set out the judgment of the United States Customs Court is *reversed.*

United States Customs Court, Third Division

RATHJEN BROS. *v.* UNITED STATES

(Decided July 1, 1942)

EKWALL, *Judge:* A quantity of rum from Cuba was imported into the United States in bottles of

one gallon or less, and entered for warehouse on May 11, 1938. Certain of the merchandise was withdrawn from warehouse at various times but the only withdrawals with which we are here concerned are those of July 6 and July 14, 1938, consisting of 40 cases and 15 cases respectively. Upon such withdrawals the collector of customs assessed duty under the Tariff Act of 1930 as modified by the trade agreement between the United States and the Republic of Cuba of August 24, 1934 (49 Stat. 3559). With that assessment we are not here concerned, for the only issue raised by the pleadings is the legality of the assessment of an additional tax of $2.25 per proof gallon under the provisions of section 600 (a) of the Revenue Act of 1918 (40 Stat. 1105), as amended by section 710 of the Revenue Act of 1938 (52 Stat. 572). Plaintiffs contend that the amount of the additional tax properly assessable under the revenue act is only $2 per proof gallon, the rate in effect at the time of the signature of the Cuban Trade Agreement, August 24, 1934 (Liquor Taxing Act of 1934, 48 Stat. 313). This claim is made by reason of the provision in article VIII of the said Cuban Trade Agreement to the effect that certain commodities (including distilled spirits) therein described shall be exempt from all taxes, fees, charges, or exactions in excess of those in effect on the day of the signing of the agreement.

The question for determination, therefore, is whether the assessment of the $2.25 rate under section 710 of the Revenue Act of 1938, which became effective as to merchandise tax paid on and after July 1, 1938, was warranted by law insofar

as it was collected upon the rum withdrawn from warehouse on July 6 and July 14, 1938.

Article VIII of the Cuban Trade Agreement, insofar as applicable, reads as follows:

> * * * and all articles enumerated and described in Schedule II annexed to this Agreement, with respect to which a rate of duty is specified in Column 2 of the said Schedule, shall be exempt from all taxes, fees, charges or exactions, in excess of those imposed or required to be imposed by laws of the United States of America in effect on the day on which this Agreement comes into force.

Section 600 (a) of the Revenue Act of 1918, *supra,* levied a tax of $2.20 per proof gallon on distilled spirits (which term includes rum). This rate was reduced by the Liquor Taxing Act of 1934, *supra,* effective January 11, 1934, and later the Revenue Act of 1939, *supra,* further amended the acts of 1918 and 1934 by increasing the tax to $2.25 per proof gallon effective July 1, 1938.

In the brief filed on behalf of the plaintiffs certain provisions of the Haitian Trade Agreement (T. D. 47667) are quoted and apparently relied on in addition to the provisions of the trade agreement with Cuba. However, the rum involved was a product of Cuba and there is nothing to indicate the applicability of the Haitian agreement to the tax here assessed under the internal revenue act, nor has any reason been given for considering that agreement.

It is the contention of the plaintiffs that, if possible, legislation enacted subsequent to the effective date of the trade agreement must be interpreted in harmony with the plain purpose of the treaty.

This is in line with the well-known rule that a treaty and an act of Congress, both being the law of the land, must be considered together and, if possible, effect given to both. *United States* v. *Powers,* 305 U. S. 527; *United States* v. *Domestic Fuel Corp.,* 21 C. C. P. A. (Customs) 600, T. D. 47010; *Bill, etc.* v. *United States,* 27 C. C. P. A. (Customs) 26, C. A. D. 57. Plaintiffs further contend that the Revenue Act of 1938, which, so far as pertinent here, changed the rate of the tax on distilled spirits from $2 to $2.25, bears no evidence of an intention to abrogate the trade agreement.

The Government contends that section 710 of the Revenue Act of 1938, being a later enactment than the Cuban Trade Agreement of 1934, should govern the assessment here involved. This contention is based upon the well-known rule that a statute later in date supersedes the conflicting provisions of an earlier treaty. *Taylor* v. *Morton,* 2 Curtis, 454; *Whitney* v. *Robertson,* 124 U. S. 190; *Head Money Cases,* 112 U. S. 580; *Cherokee Tobacco case,* 11 Wall. 616; *Ropes* v. *Clinch,* 8 Blatchf. 304; *Rainey* v. *United States,* 232 U. S. 310; *United States* v. *Lee Yen Tai,* 185 U. S. 213, 221.

Without deciding whether the trade agreement here involved is a treaty, it is the opinion of the court that being an international agreement entered into by authority of an act of Congress, it would be subject to the same rule in the event that its terms conflict with a later act of Congress.

Congress is presumed to have enacted the revenue act here in question with knowledge of the terms of the Cuban Trade Agreement. Had it

been the intention of the lawmaking body that the products of Cuba should not be subject to the tax imposed by the revenue act, such intention might very well have been expressed in the latter act by suitable wording. This was done in the enactment of section 601 (a) of the Revenue Act of 1932, which levied certain taxes, subject, however, to the proviso "unless treaty provisions of the United States otherwise provide."

It is interesting to note that in the supplementary trade agreement with Cuba (T. D. 50050), which became effective December 23, 1939, article VIII of the agreement of August 24, 1934, was amended insofar as pertinent to the issue herein, to read as follows: [We quote the third and fifth paragraphs of article III thereof]

> Articles the growth, produce or manufacture of the Republic of Cuba enumerated and described in Schedule II annexed to this Agreement shall, on their importation into the United States of America, be exempt from all duties other than ordinary customs duties and all taxes, fees, charges or exactions, imposed on or in connection with importation, in excess of those imposed on September 3, 1934, or required to be imposed thereafter by laws of the United States of America in force on September 3, 1934.
>
> * * * * *
>
> The provisions of Article I and Article III of this Agreement and of the third paragraph of this Article shall not prevent the Government of the United States of America from imposing at any time on the importation of any article a charge equivalent to an internal tax imposed in respect

> of a like domestic article or in respect of a commodity from which the imported article has been manufactured or produced in whole or in part.

In a further supplementary trade agreement with Cuba (T. D. 50541) the last paragraph above quoted was further amended as follows:

> The provisions of this Agreement shall not prevent the Government of either country from imposing at any time on the importation of any article a charge equivalent to an internal tax imposed in respect of a like domestic article or in respect of a commodity from which the imported article has been manufactured or produced in whole or in part.

The above-quoted excerpts are enlightening as indicative of the intention of the parties to the trade agreement and also of their understanding of the terms of such agreement. Apparently both parties recognized that under the terms of article VIII of the original trade agreement with Cuba the exclusive rates therein provided would not be subject to laws which might subsequently be enacted, which later laws might be in conflict with the terms of the agreement. Apparently, also, in these later agreements it was considered wise by both parties to provide for the imposition of a rate or charge which would be compensatory for increased internal taxes imposed on like domestic goods. As evidence of this we quote from a press release entitled "The Analysis of General Provisions and Reciprocal Benefits in the Supplementary Trade Agreement with Cuba," issued by the Department of State on December 23, 1941, as follows:

> Article IV amends Article VIII of the existing agreement, relating to internal and compensating taxes on imports. Recognizing the reasonableness of compensatory charges on imports when like domestic products are subjected to new or increased internal taxes imposed for bona fide revenue purposes, the amended Article provides that each country may apply to scheduled products imported from the other, equivalent to internal taxes imposed on like domestic products. Such compensatory charges may not be greater than those imposed on like articles imported from third countries.

For the reasons above set forth we find that the claim of the plaintiffs herein is well founded. At the time the trade agreement with Cuba came into force, viz, August 24, 1934, rum was taxable with an internal revenue tax at the rate of $2 per proof gallon under the terms of the Liquor Taxing Act of 1934, *supra.* The increased rate on distilled spirits (which term includes rum) fixed by the Revenue Act of 1938, viz, $2.25 as of July 1, 1938, should not be held to apply to rum imported from and the product of Cuba which by the terms of a trade agreement with that country, was exempt from taxes in excess of the amount in effect on August 24, 1934, viz, $2 per proof gallon.

We therefore find that the portion of the rum here imported which was withdrawn from warehouse on July 6 and July 14, 1938, is subject to assessment under the Liquor Taxing Act of 1934, at $2 per proof gallon. Judgment will be rendered for the plaintiff accordingly.

U. S. GOVERNMENT PRINTING OFFICE: 1943